

BOULT
CUMMINGS
CONNERS
& BERRY PLC

LAW OFFICES
414 UNION STREET, SUITE 1600
POST OFFICE BOX 198062
NASHVILLE, TENNESSEE 37219

Henry Walker
(615) 252-2363
Fax: (615) 252-6363
Email: hwalker@bccb.com

November 17, 2000

RECEIVED
NOV 17 PM 2 56

TELEPHONE (615) 244-2582
FACSIMILE (615) 252-2380
INTERNET WEB <http://www.bccb.com/>

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505


In Re: *Generic Docket to Establish UNE Prices for Lines Sharing per FCC 99-355, and
Riser Cable and Terminating Wire as Ordered in TRA Docket 98-00123.*
Docket No. 00-00544

Dear David:

Please find enclosed the original and thirteen copies of the Data Coalition's Opposition to BellSouth's Motion to File Surrebuttal and to Postpone the Hearing. Please bring this to the attention of Director Lynn Greer, the Hearing Officer in this proceeding.

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:


Henry Walker

HW/nl
Attachment
c: Parties

POSTED
11-20-00

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

In re:)
Generic Docket To Establish UNE Prices)
for Line Sharing Per FCC 99-355, and) **Docket No. 00-00544**
Riser Cable and Terminating Wire as)
Ordered in Authority Docket 98-00123)

**DATA COALITION'S OPPOSITION TO BELL SOUTH'S MOTION TO FILE
SURREBUTTAL AND TO POSTPONE HEARING**

DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"), Broadslate Networks of Tennessee, Inc, ("Broadslate") and MGC Communications, Inc., d/b/a Mpower Communications Corporation ("Mpower") (collectively, the "Data Coalition") respectfully ask this Authority to deny BellSouth's request for the right to file surrebuttal and for an order postponing the hearing. BellSouth has not shown that it is entitled to have the "last word" in testimony and has not provided any reason for the Authority to alter its Procedural Order. Moreover, the Data Coalition wishes to move forward expeditiously with the hearing as scheduled.

DISCUSSION

A. The Procedural Order in this Case

BellSouth argues that it is entitled to surrebuttal because it is at a "significant disadvantage" because the Procedural Order does not allow BellSouth to file additional testimony in response to the Data Coalition's testimony. The irony of BellSouth arguing that it is at a "significant disadvantage" is profound. On Monday, November 13, 2000, BellSouth filed an entirely new cost study in this proceeding, consisting of some 200 pages and numerous files, excel spreadsheets, and narratives on a CD Rom. With this filing, BellSouth has now filed three cost studies since the Tennessee Regulatory Authority ("Authority") issued the Procedural Order

in this case: one on October 2, 2000, one October 20, 2000 and one November 13, 2000. The most recent new cost study was filed six weeks after the Procedural Order in this case required cost studies to be filed, five days before the Data Coalition's rebuttal testimony was due, and a mere two weeks before the actual hearing. This puts the Data Coalition at a "significant disadvantage." Nonetheless, the Data Coalition is prepared to go forward with the hearing as scheduled.

a. The Burden of Proof

BellSouth and Sprint bear the burden of proof in this case. BellSouth and Sprint must establish through direct testimony and other evidence that their proposed rates comply with the FCC federal pricing rules, 47 C.F.R. §§ 51.501 – 51.511, 51.515, that these rates are based on a forward-looking network, and that they result from necessary and efficient practices and procedures for provisioning UNEs. If either ILEC fails to meet this burden of proof, its rates cannot be adopted. Presumably to meet their burden of proof, both ILECs filed direct testimony.

b. The Procedural Order Did Not Require the Data Coalition to File Direct Testimony and Does not Allow Surrebuttal

Significantly, the Procedural Order in this docket was discussed and agreed to during the August 3, 2000 hearing by all the parties, including BellSouth. Furthermore, the Procedural Order was issued on August 10, 2000, giving BellSouth more than three months to object to that schedule. BellSouth did not do so. Nonetheless, BellSouth now seeks relief from the Procedural Order to which it agreed.

Moreover, the Procedural Order in this case certainly did not require the Data Coalition to file direct testimony, nor does it guarantee BellSouth the right to have the "last word" in testimony. Even BellSouth admits that the Data Coalition is free to file its testimony as rebuttal. Although BellSouth filed one set of cost studies in October, the testimony supporting and

explaining that study was not filed until November 13, 2000. The November 13, 2000 testimony provides the underpinnings of the cost studies. In fact, BellSouth witness Caldwell states that the purpose of her testimony is “to present and support the cost study results for the unbundled network elements (“UNEs”) both those previously filed in this docket and for those attached to this testimony.” (Caldwell at 2) Caldwell further explains approximately 14 Authority-ordered adjustments to the BellSouth cost studies and describes how those adjustments were incorporated into the BellSouth studies. (Caldwell at 9-13). Likewise, BellSouth witness Milner explains the network engineering assumptions that underlie BellSouth’s studies. Thus, prudence demanded that the Data Coalition review this testimony before filing its own.

That decision was further vindicated by BellSouth’s filing of new cost study on November 13, 2000, making adjustments to its cost studies on virtually every issue the Data Coalition is focused on, including: Access to Loop Makeup Information, Line Sharing, Loop Conditioning, and xDSL Loops. It is clear that any subject relating to any of the cost studies or in response to any other testimony submitted by BellSouth is the proper subject of rebuttal.

BellSouth is not disadvantaged by this Procedural Order because the Data Coalition will have its witnesses at the hearing and available for cross examination. Moreover, BellSouth certainly faces no more disadvantage than members of the Data Coalition have faced in both North Carolina and Florida, where BellSouth took the opportunity in surrebuttal to file testimony of new witnesses who did not file direct testimony. In those cases in North Carolina and Florida, it was members of the Data Coalition who were unable to file any written response to the BellSouth filing. Now that the shoe is on the other foot, BellSouth claims it is at a disadvantage that warrants the right to file surrebuttal.

We believe that the testimony schedule should stand. BellSouth has had an opportunity to put forward its direct case, and the Data Coalition will put forth a rebuttal to that case. Both parties will bring the necessary witnesses to the hearing and any issues that need to be further clarified can be raised in cross examination at the hearing.¹

B. BellSouth's Motion to Postpone Hearing

In addition to surrebuttal, BellSouth seeks to postpone the hearing, arguing that interim rates have been set on all of the DSL issues.² As the Authority is well aware, Covad and BlueStar initially brought this petition to expand the Line Sharing and Network Terminating Wire docket to include other DSL issues because of a critical business need to establish permanent, pro-competitive rates for DSL UNEs and related services in Tennessee. Recognizing the competitive concerns raised by Covad and BlueStar, the Authority determined that it would set interim rates but, nonetheless, would move expeditiously toward a hearing on November 27, 2000.

As the Data Coalition's letter seeking clarification of the interim ruling on the UCL loop makes clear, the Data Coalition believes that the Authority has set the interim rate for the UCL at the SL1 rate. In contrast, BellSouth apparently believes that the Authority has set the interim UCL rate in Tennessee at the rate BellSouth proposed, \$270.01 nonrecurring.

The Data Coalition relishes the opportunity to prove to the Authority that the proper cost based nonrecurring rate for UCL loops is at or near the SL1 rate. If, as the Data Coalition

¹ Covad's offer to allow BellSouth to file surrebuttal before the hearing was an attempt to ensure that the hearing moved forward as planned. Clearly, any surrebuttal must be filed before the hearing begins.

² It should be noted that rescheduling the Tennessee hearing will be difficult given the pendency of pricing hearings in Georgia, Alabama, and Louisiana in January, February and March, respectively.

believes it has, the Authority has set the interim UCL loop rate at SL1 rate, the Data Coalition could agree to a brief postponement of the hearing. If the interim rate is what BellSouth proposed (\$270.01), the Data Coalition believes it is imperative to move ahead without delay. Nonrecurring rates as high as BellSouth proposes, even in the interim, create significant barriers to entry and have an immediate and detrimental effect on the Data Coalition's success in the Tennessee marketplace.

BellSouth seeks an extension, arguing that it has no meaningful opportunity to respond to the testimony, to review the testimony, or to prepare cross examination. Nonetheless, by filing a cost study at the last minute, BellSouth has put the Data Coalition in a position where it has very little opportunity to adequately review either the testimony that is filed or the new cost study, let alone make comparisons between the new cost study and the old cost study and draw any meaningful conclusions from those. Nonetheless, the Data Coalition stands ready to proceed. Although we can certainly appreciate the pendency of the Thanksgiving holiday period, members of the Data Coalition are working seven days a week in order to prepare for this hearing. The issues pending in this docket are critical to the success of the Data Coalition in the Tennessee marketplace and, given that level of significance, we give this docket our highest priority.

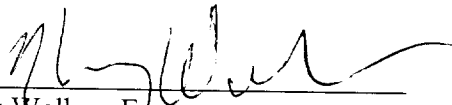
CONCLUSION

For these reasons, the Data Coalition respectfully requests that the Authority deny BellSouth's motion.

Dated: November 17, 2000

Respectfully submitted,

THE DATA COALITION



Henry Walker, Esq.
Boult, Cummings, Conners & Berry, PLC
414 Union Street
Suite 1600
P.O. 198062
Nashville, TN 37219

Catherine F. Boone
Covad Communications Company
10 Glenlake Parkway, Suite 650
Atlanta, Georgia 30328

Eric J. Branfman
Joshua M. Bobeck
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW Suite 300
Washington, DC 20007-5116

Counsel for Broadslate Networks of Tennessee, Inc.

John Kerkorian
MGC Communications, Inc., d/b/a Mpower
Communications Corp.
5607 Glenridge Drive, Suite 310
Atlanta, GA 30342

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 17th day of November, 2000.

Guy Hicks, Esq.
BellSouth Telecommunications, Inc.
Suite 2101
333 Commerce Street
Nashville, Tennessee 37201-3300

Jim Lamoureux
AT&T
1200 Peachtree St., NE
Room 4060
Atlanta, GA 30309

Jon Hastings, Esq.
Boult, Cummings, Conners & Berry PLC
414 Union St., Suite 1600
Nashville, TN 37219

James Wright, Esq.
United Telephone Southeast
14111 Capitol Blvd.
Wake Forest, NC 27587

Charles B. Welch, Esq.
Farris, Mathews, Branan & Hellen PLC
205 Capitol Blvd., Suite 303
Nashville, TN 37219

R. Dale Grimes, Esq.
Bass, Berry & Sims, LC
2700 First American Center
Nashville, TN 37238-2700

Dana Shaffer, Esq.
NEXTLINK Tennessee, Inc.
105 Molloy St., Suite 300
Nashville, TN 37201

Michael Bressman, Esq.
BlueStar Networks, Inc.
Five CorporateCentre Dr., Suite 600
Franklin, TN 37067

Catherine F. Boone, Esq.
COVAD Communications, Inc.
10 Glenlake Parkway, Suite 650
Atlanta, GA 30328

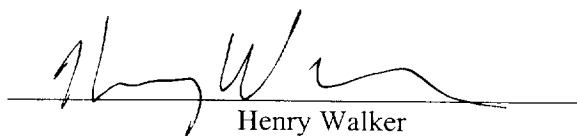
Clay Arendes, Esq.
Vectris Telecom, Inc.
6500 River Place Blvd.
Building 2, Suite 200
Austin, TX 78730

Eric J. Branfman, Esq.
Marc B. Rothschild, Esq.
Swidler, Berlin, Shereff, Friedman, LLP
3000 K Street, Suite 300
Washington, DC 20007-5116

Susan Berlin, Esq.
MCI Telecommunications d/b/a
MCI WorldCom
6 Concourse Parkway
Atlanta, GA 30328

Bennett Ross, Esq.
BellSouth Telecommunications, Inc.
675 W. Peachtree St., Suite 4300
Atlanta, GA 30375

John Spilman
Director of Regulatory Affairs and
Industry Relations
BroadSlate Networks, Inc.
675 Peter Jefferson Parkway, Suite 310
Charlottesville, VA 22911


Henry Walker